Supreme Court, U.S.
FILED
JAN 11 1996
OFFICE OF THE CLERK

No. 95-747

In The

Supreme Court of the United States

October Term, 1995

BILL MISURA,

Petitioner,

v.

COUNTY OF EL DORADO, on behalf of JOHNNY FLETCHER WOODS, a minor child,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

RESPONDENT'S BRIEF IN OPPOSITION

DANIEL E. LUNGREN,
Attorney General of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney General
CAROL ANN WHITE
Statewide Support Coordinator
*MARY JANE HAMILTON
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5163

Counsel for Respondent
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether California Family Code § 7555 violated substantial due process and is therefore unconstitutional.

2. Whether as applied in this case California Family Code § 7555 is unconstitutional.

3. Whether as interpreted by the California Court of Appeal, § 7555 is really a conclusive presumption, and thus, violates due process.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

ARGUMENTS 2

I. THIS COURT LACKS JURISDICTION BECAUSE THE CONSTITUTIONAL QUESTION OF "DUE PROCESS" WAS NEVER PROPERLY RAISED BELOW AND, ACCORDINGLY, WAS NEVER ADDRESSED BY THE STATE COURT 2

II. THE STATE COURT'S DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND 4

A. California Family Code § 7555 As Drafted Does Not Violate Substantial Due Process ... 5

B. California Family Code § 7555 Was Not Applied To Petitioner In This Case So As To Violate His Due Process Rights 6

III. CALIFORNIA FAMILY CODE § 7555 CREATES A REBUTTABLE PRESUMPTION: THE CALIFORNIA COURT OF APPEAL DID NOT APPLY IT AS A CONCLUSIVE PRESUMPTION AND DID NOT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Beck v. Washington, 369 U.S. 541 (1962) 3

Cramer v. Morrison, 88 Cal.App.3d 873 (1979) 5

Godchaux Co. v. Estopinal, 251 U.S. 179 (1919) 3

Illinois v. Gates, 462 U.S. 213 (1982) 3

In re Lamkin, 355 U.S. 59 (1957) 3

Michael H. et al. v. Gerald D., 491 U.S. 110 (1989) ...8, 9

Whitney v. California, 274 U.S. 357 (1927) 3

STATUTES

28 U.S.C.
§ 1257(a) 1, 2

California Evidence Code
§ 606 6

§ 895 5

California Family Code
§ 7540 8

§ 7555 ..... 2, 4, 5, 6, 8

California Statutes
1986, ch. 629, § 1 5

1992, ch. 851, § 3 5

COURT RULES

Supreme Court Rule
14.1(h) 2, 4, 10

OTHER AUTHORITIES

Robert L. Stern et al., Supreme Court Practice 373
(7th ed., 1991) 1

Respondents El Dorado County, California, respectfully request that this Court deny the petition of Bill Misura for a writ of certiorari seeking review of the opinion of the Court of Appeal of the State of California, Third Appellate District.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction because petitioner never properly raised the constitutional question of due process below, as required by 28 U.S.C. § 1257(a).

This Court also lacks jurisdiction because the state appellate decision rests on an adequate and independent state law ground.

STATEMENT OF THE CASE

Respondents incorporate by reference the facts as stated by the California Court of Appeal's decision below. Pet. App. pp. 2-21. See Robert L. Stern et al., Supreme Court Practice 373 (7th ed., 1991) (approving this practice).

REASONS FOR DENYING THE WRIT

The writ should be denied because the constitutional question of due process was never properly raised below as required by 28 U.S.C. § 1257(a) and was, accordingly

never addressed by the state court. In addition, the decision below is not reviewable because it rests on an adequate and independent state law ground: California's paternity-index-presumption statute, i.e., California Family Code § 7555.

Finally, even if these two critical jurisdictional defects did not exist, review should be denied because the court correctly applied the constitutionally-adequate California statute, and petitioner offered no evidence below by way of expert testimony, etc., which provided any basis for his present challenge to the accuracy of the blood tests relied upon to trigger the paternity-index presumption.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE CONSTITUTIONAL QUESTION OF "DUE PROCESS" WAS NEVER PROPERLY RAISED BELOW AND, ACCORDINGLY, WAS NEVER ADDRESSED BY THE STATE COURT.

Title 28 U.S.C. § 1257 expressly limits this Court's review of state court decisions to cases where a federal question is involved. 28 U.S.C. § 1257(a).

Petitioner conspicuously fails to address this basic, threshold jurisdictional requirement. This is not a mere technicality. It is fatal to his petition.

Before this Court may entertain an appeal from a state court, Supreme Court Rule 14.1(h) requires the petitioner to state:

> " . . . *the stage in the proceedings,* both in the court of first instance and in the appellate courts, *at which the federal questions sought to be reviewed were raised;* the method or manner of raising them and *the way in which they were passed upon by those courts.* . . . " (Emphasis added.)

In interpreting these requirements, this Court has held that a petitioner has the burden of establishing that the federal question was timely and properly raised in the state court proceeding. *Godchaux Co. v. Estopinal,* 251 U.S.179, 181 (1919); *Beck v. Washington,* 369 U.S. 541, 550-554 (1962). A failure to observe state procedural rules for the raising of constitutional questions requires dismissal of the petition. *In re Lamkin,* 355 U.S. 59 (1957). This Court has also held that the federal claim must have both been raised *and decided* by the state court. *Whitney v. California,* 274 U.S. 357, 360 (1927). This Court has declined to decide an issue which this Court itself had framed but which was not presented to the state courts which, accordingly, did not address it as framed by this Court. *Illinois v. Gates,* 462 U.S. 213, 217 (1982).

In this case, it is undisputed that petitioner did not raise the due process issue before the trial level. Nor did he raise the issue in his briefs before the California Court of Appeal, Third Appellate District. Pet. App. pp. 1-23. It was only in his petition for review before the California Supreme Court that he raised a due process issue at all, and then only in the sense that he contended his due process rights had been violated because the underlying paternity testing which had triggered the paternity presumption in his case, was unreliable, allegedly being flawed in the scientific sense. The California Supreme

Court summarily denied review. Thus, it did not decide the due process issue in either of the forms petitioner now presents to this Court, i.e., that California's paternity-index-presumption statute (§ 7555) qua statute, is repugnant to the Constitution's due process clause; or, in the alternative, the manner in which this paternity-index-presumption statute was applied in his individual case, violated his constitutional right to due process. Pet. App. p. 26.

This means that a critical requirement for the exercise of this Court's jurisdiction under Rule 14.1(h), i.e., a final state court decision on the merits of the due process issue, is missing. By not properly raising it before the California courts, petitioner is deemed to have waived his right to raise the due process issue before this Court.

There being no proper basis for this Court to take jurisdiction over the issues raised, the petition must be denied in its entirety.

II.

THE STATE COURT'S DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Even if this Court were to find that the question of due process had been adequately raised below, review by this Court would still be unwarranted because the decision is fully supported on an independent state ground: California Family Code § 7555 is not repugnant to the Fifth and Fourteenth Amendments to the Constitution and as applied to petitioner by the California Court of Appeal, Third Appellate District, did not operate so as to

deprive petitioner of his constitutional right to due process.

A. California Family Code § 7555 As Drafted Does Not Violate Substantial Due Process

In furtherance of a public policy in favor of the establishment of the parent and child relationship, the California legislature enacted a presumption of paternity affecting the burden of proof in any paternity case where the paternity index is 100 or greater.

In California, blood tests have long been considered conclusive in their showing of *nonpaternity*. California Evidence Code § 895. *Cramer v. Morrison*, 88 Cal.App.3d 873 (1979), held that then-newly developed blood testing results were to be admitted to *establish paternity* because they comprised highly probative scientific evidence on the issue of paternity and it was beneficial to establish the paternity of each and every child born. *Id.* p. 885. In 1986, the California Legislature enacted Evidence Code § 895.5 (the present California Family Code § 7555) which moved beyond the simple admissibility of blood test evidence to establish paternity and created this outright presumption of paternity whenever blood tests yield a so-called "paternity index" over 100. Cal. Stats. 1986, ch. 629, § 1. In 1992, the Legislature modified the language of section 895.5 to its present form so as to include so-called DNA tests within its scope. Cal. Stats. 1992, ch. 851, § 3.

This paternity-index-presumption was originally California Evidence Code § 895.5. When California initiated its new Family Code, effective January 1, 1994, the section became California Family Code § 7555. It provides in part

that there "is a rebuttable presumption, affecting the burden of proof, of paternity, if the court finds that the paternity index, as calculated by the experts qualified as examiners of genetic markers, is 100 or greater." California Family Code § 7555. The presumption may be rebutted by a preponderance of the evidence. California Family Code § 7555. It is a presumption affecting the burden of proof. California Evidence Code § 606 provides that the "effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

This paternity-index-presumption statute is not repugnant to the Fifth and Fourteenth Amendments of the Constitution. It furthers the public policy of establishing every child's paternity. It safeguards the alleged father's right to present evidence to rebut the presumption, such as flawed test results, sterility, impotency, lack of access to the mother, etc. It guarantees the alleged father the right to have his day in court and to present such evidence which by a simple "preponderance" will overcome the scientific testing results.

Nothing more is constitutionally required of the statute.

B. California Family Code § 7555 Was Not Applied To Petitioner In This Case So As To Violate His Due Process Rights

Petitioner's paternity index was found by the experts to be 970, i.e., well beyond the paternity index of 100 required to trigger the statutory presumption. These

results were known well before his civil trial. Petitioner could have petitioned the court for re-testing (and even, more sophisticated testing) had the blood test results been suspicious. Petitioner did not so petition.

The doctor who had performed the blood-testing testified at the paternity trial. Petitioner cross-examined the doctor at length. Petitioner had an opportunity to present an opposing blood-test expert but did not do so. The court found the doctor credible and the results reliable.

The child's mother testified that she and petitioner had had sexual contact.

Petitioner did not take the stand or otherwise offer evidence of his sterility, impotency, or lack of access to the mother, etc.

In other words, petitioner had notice and the opportunity to be heard. The evidence he offered was simply insufficient to establish his non-paternity. Evidence that "other men" indisputably also had sexual access to the mother – without more – is insufficient to overcome the combined evidence of the scientific tests with the mother's unrebutted testimony of sexual intercourse between herself and petitioner. That is what the California Court of Appeal, Third Appellate District found when it reversed the trial court's finding of non-paternity.

Petitioner's due process rights were not violated by this process. Given the present day accuracy of blood genetic marker tests, it is not necessary for the law to require the mother or the child (or the public authorities on behalf of the child) to locate all possible "other men" and to exclude them from paternity before the paternity

of one of the alleged fathers can be affirmatively established.

III.

CALIFORNIA FAMILY CODE § 7555 CREATES A REBUTTABLE PRESUMPTION: THE CALIFORNIA COURT OF APPEAL DID NOT APPLY IT AS A CONCLUSIVE PRESUMPTION AND DID NOT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS.

Finally, petitioner argues that the paternity-index-presumption statute (California Family Code § 7555) *as applied to him* by the appellate court operated as a *conclusive* presumption and any such conclusive presumption violates his due process rights.

This is not correct.

This Court in *Michael H. et al. v. Gerald D.*, 491 U.S. 110 (1989), examined the bona fide conclusive presumption of paternity contained in California Family Code § 7540 (formerly California Evidence Code § 621). This Court did not find that that conclusive presumption violated an alleged father's due process rights. *Id.* pp. 119-130.

Here, too, even if petitioner could prevail on the issue that the California Court of Appeal, Third Appellate District, applied the rebuttable paternity-index-presumption statute (California Family Code § 7555) in such a way that it operated in his case as a *conclusive* presumption, that fact does not stand for the proposition that petitioner's constitutional right to due process was ipso facto, violated.

Something more is needed. Petitioner does not even argue that "something more" was at issue here. Petitioner is correct because there simply is no question here but that petitioner had timely notice of the paternity action at issue and that, although he declined to introduce his own expert and/or to take the stand and testify himself, he had his day in court where he had full opportunity to present any and all relevant evidence and to be heard by a court of law.

In sum, even if petitioner had properly raised the due process issue below, certiorari would not be warranted because the decision of the California Court of Appeal, Third Appellate District, was fully consistent with this Court's precedent in *Michael H.*

CONCLUSION

Petitioner having failed to comply with the requirements of Supreme Court Rule 14.1(h), and there being no state court judgment or decision regarding the merits of the questions raised in this petition, the petition should be denied.

Dated: January 11, 1996

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General
of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney
General
CAROL ANN WHITE
Statewide Support Coordinator

*MARY JANE HAMILTON
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5163

Counsel for Respondent
*Counsel of Record